

RECORDATION NO. 19287-A FILED 1425
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INTERSTATE COMMERCE COMMISSION

LEASE OF RAILROAD EQUIPMENT

BETWEEN

NATIONAL CITY LEASING CORPORATION

AND

RAILTEX, INC.

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LEASE OF RAILROAD EQUIPMENT

THIS LEASE OF RAILROAD EQUIPMENT ("Lease") is made as of February 22, 1995 between NATIONAL CITY LEASING CORPORATION, a Kentucky corporation (hereinafter called "Lessor"), and RAILTEX, INC., a Texas corporation (hereinafter called the "Lessee").

WHEREAS, Lessor hereby represents that it has the right to lease the ten (10) boxcars more fully described in Annex A hereto (hereinafter called the "Unit(s)");

WHEREAS, Lessor desires to lease to Lessee and Lessee desires to lease from Lessor the Units;

WHEREAS, Lessee desires to purchase from the Lessor and Lessor desires to sell to the Lessee all the Units at the expiration of the Term of this Lease (as defined in Subsection 4.A. below);

NOW, THEREFORE, in consideration of the premises and of the rentals to be paid and the covenants hereinafter mentioned to be kept and performed by Lessee, Lessor hereby leases the Units to Lessee upon the following terms and conditions:

1. **Lease.** Lessor agrees to furnish and lease to Lessee, and Lessee agrees to accept and use the Units.
2. **Acceptance and Delivery of Units.**
 - A. Lessor agrees to furnish the Units in compliance with the Federal Railroad Administration ("FRA") and Association of American Railroads ("AAR") rules of interchange in effect at the time of delivery. Lessee, at its expense, shall inspect and accept the Units subject to this Lease at their present location at the A & K Railroad Materials Yard in Granite City, Illinois (the "Delivery Point"). Acceptance of the Units by Lessee shall be evidenced by a "Certificate of Acceptance" in the form set forth in Annex B attached hereto, the execution of which shall constitute conclusive evidence of acceptance of the Units therein identified.
 - B. Lessee agrees to be responsible for any transportation cost associated with moving the Units from receipt at the Delivery Point.
3. **Car Hire Earnings.**
 - A. Upon delivery of the Units as set forth in Section 2 hereof, with reporting marks on each Unit as set forth in Section 6 and Annex A hereto, Lessee shall enjoy all car hire earnings (per diem and mileage) thereafter until the expiration or sooner termination of this Lease. Lessor shall not be responsible for the collection of any car hire earnings and such responsibility shall lie solely with Lessee.

- B. Lessee acknowledges that the Interstate Commerce Commission ("ICC") has significantly altered the manner in which car hire rates are prescribed. Lessee shall not, without Lessor's prior written consent, voluntarily elect to deprescribe any Unit subject to this Lease by designating any Unit a market rate car pursuant to 49 CFR 1033.1(b)(3).

4. Term of Lease.

- A. The term of this Lease shall commence for each Unit as of January 20, 1995 (the "Effective Date") and shall continue in full force and effect through and including January 31, 2000 (the "Term of this Lease").
- B. The obligations of Lessee hereunder (including, but not limited to, the obligations of Lessee under Sections 7, 10 and 12 hereof) shall survive the expiration or sooner termination of this Lease.

5. Rentals.

- A. Lessee shall pay to Lessor as rental for the Units an amount of three hundred twenty-five dollars (\$325.00) per Unit per month ("Rent"). Rent shall become effective for each Unit upon the Effective Date, and shall continue in effect for each Unit, until the date on which Lessor receives the Purchase Price for all the Units as hereinafter provided in Section 12. During the Term of this Lease, payment of Rent shall be made on the first day of each month in advance, provided, however, that the first month's Rent payment for the Units shall be prorated from the Effective Date and such pro rata payment due for that month shall be added to, and paid with the following month's rent. Payment of Rent shall be made to Lessor at the address specified in Section 18.
- B. In the event Lessee shall be in default in the payment of any sum of money to be paid under this Lease, whether rental or otherwise, Lessee shall pay Lessor, as additional rental, to the extent permitted by applicable law, interest on such unpaid sum from its due date to date of payment by Lessee at a rate equal to eighteen percent (18%) per annum or the maximum rate permitted by law, whichever is less. Any costs incurred by Lessor in collecting Rent or any other sum of money due under this Lease wrongfully withheld by Lessee, including, but not limited to, reasonable attorneys' fees, will be paid by Lessee.
- C. This Lease is a net lease and Lessee shall not be entitled to any abatement of Rent, reduction thereof or set-off against Rent, including, but not limited to, abatements, reductions or setoffs due or alleged to be due to, or by reason of, any past, present or future claims of Lessee against Lessor under this Lease or otherwise; nor shall

this Lease terminate, or the respective obligations of Lessor or Lessee be otherwise affected, by reason of any defect in or damage to or loss of possession or loss of use of or destruction of all or any of the Units from whatsoever cause, the prohibition of or other restriction against Lessee's use of all or any of the Units, the interference with such use by any private person or entity or any government authority, the invalidity or unenforceability or lack of due authorization of this Lease, or for any other cause whether similar or dissimilar to the foregoing, any present or future law to the contrary notwithstanding, it being the intention of the parties hereto that the rents and other payments payable by Lessee hereunder shall continue to be payable in all events in the manner and at the times herein provided. To the extent permitted by applicable law, Lessee hereby waives any and all rights which it may now have or which at any time hereafter may be conferred upon it, by statute or otherwise, to terminate, cancel, quit or surrender the lease of any Units except in accordance with the express terms hereof. Each rental or other payment made by Lessee hereunder shall be final and Lessee shall not seek to recover all or any part of such payment from Lessor for any reason whatsoever. The rentals and other sums payable by Lessee hereunder shall be paid without notice, demand, counterclaim, or defense by reason of any circumstance or occurrence whatsoever, except as otherwise provided herein.

6. Identification Marks.

- A. Lessee shall, at its expense, (i) remark each Unit to bear the New Reporting Mark and Numbers as provided in Annex A and (ii) place Automatic Equipment Identification Tags on such Unit.
- B. Lessee will cause each Unit to be kept numbered with the New Reporting Mark and Numbers as set forth in Annex A hereto and will keep and maintain, plainly, distinctly, permanently and conspicuously marked on each side of such Unit in letters not less than one inch in height, the words "Ownership subject to a security agreement filed with the Interstate Commerce Commission" or other appropriate words designated by Lessor, with appropriate changes thereof and additions thereto as from time to time may be required by law in order to protect the title of the owner and the rights of Lessor under this Lease. Lessee will not place any such Unit in operation or exercise any control or dominion over the same until such names and word or words shall have been so marked on both sides thereof and will replace promptly any such names and word or words which may be removed, defaced or destroyed. Lessee will not permit the identifying mark and number of any Unit to be changed without written consent of Lessor and in accordance with a statement of new identifying numbers to be substituted therefor, which statement previously shall have been filed

with Lessor by Lessee and filed, recorded or deposited in all public offices where this Lease will have been filed, recorded and deposited.

- B. Except as above provided, Lessee will not allow the name of any person, association or corporation to be placed on the Units as a designation that might be interpreted as a claim of ownership.

7. **Taxes.** All payments to be made by Lessee hereunder will be free of expense to Lessor for collection or other charges and will be free of expense to Lessor with respect to the amount of any local, state or federal taxes (other than the federal income tax payable by Lessor in consequence of the receipt of payments provided herein and other than state or city income taxes or franchise taxes measured by gross or net income based on such receipts or based on capital employed by Lessor, except any such tax which is in substitution for or relieves Lessee from the payment of taxes which it would otherwise be obligated to pay or reimburse as herein provided), assessments, charges, fines, penalties or licenses (and any charges, fines or penalties in connection with or measured by, this Lease or any sale, rental, use, payment, shipment, delivery or transfer of title under the terms hereof) ("**Impositions**"), all of which Impositions Lessee assumes and agrees to pay on demand in addition to the payments to be made by it provided for herein. Lessee will also pay promptly all Impositions which may be imposed upon any Unit or for the use or operation thereof or upon Lessee's earnings arising therefrom or upon Lessor solely by reason of its ownership thereof and will keep at all times all and every part of such Unit free and clear of all Impositions which might in any way affect the title of Lessor or result in a lien upon any such Unit.

8. **Loss, Damage or Destruction.**

- A. **Risk of Loss, Damage or Destruction.** As between Lessee and Lessor and any person claiming through Lessor, Lessee hereby assumes all risk of loss, damage, theft, taking, destruction, confiscation, requisition or commandeering, partial or complete, of or to each Unit, however caused or occasioned (provided that Lessor shall be responsible for any and all damage and liabilities caused by Lessor), such risk to be borne by Lessee with respect to each Unit from the Acceptance Date and continuing until the date on which Lessor receives the Purchase Price for all the Units as hereinafter provided in Section 12. Lessee agrees that, except as otherwise provided herein, no occurrence specified in the preceding sentence shall impair, in whole or in part, any obligation of Lessee under this Lease, including, without limitation, the obligation to pay Rent.
- B. **Casualty Occurrence.** If, during the Term of this Lease, any Unit shall be or become lost, stolen, destroyed or irreparably damaged from any cause whatsoever, or any Unit

shall be condemned, confiscated, or seized, or the title to or use of any Unit shall be requisitioned for a period of ninety (90) continuous days (such occurrences being hereinafter called "Casualty Occurrence(s)"), Lessee shall on the next succeeding rental payment date after it shall have determined that such Unit has suffered a Casualty Occurrence, fully inform Lessor in regard thereto. On such date Lessee shall pay to Lessor an amount equal to any accrued rental for such Unit to the date of such payment. Lessee shall also pay Lessor a settlement value payment of fifteen thousand dollars (\$15,000.00) per Casualty Occurrence ("Settlement Value"). Upon the making of such Settlement Value payment by Lessee in respect of any Unit, the rental for such Unit shall cease to accrue as of the date of such payment, the Term of this Lease as to such Unit shall terminate and, except in the case of the loss, theft or complete destruction of such Unit, Lessee shall be entitled to ownership and possession of such Unit or the remains thereof. Lessor has the right, in its sole discretion, to replace any Unit subject to a Casualty Occurrence and any such replacement Unit will be subject to this Lease as if originally a part thereof.

- C. Except as hereinabove in this Section 8 provided, Lessee shall not be released from its obligations hereunder in the event of, and shall bear the risk of, any Casualty Occurrence to any Unit after the Acceptance Date for such Unit.

9. Report, Inspection and Record Keeping.

- A. On or before March 31 in each year, commencing with the calendar year 1996, Lessee will furnish to Lessor an accurate statement setting forth as of the preceding calendar year end (i) the amount, description and numbers of all Units then leased hereunder, (ii) the amount, description and numbers of all Units that have suffered a Casualty Occurrence during the preceding calendar year and, (iii) such other information regarding the condition and state of repair of the Units as Lessor may reasonably request.
- B. Lessor or its agent, at its sole cost and expense, shall have the right to inspect the Units and Lessee's records with respect thereto at such reasonable times as Lessor may request during the Term of this Lease.
- C. Lessee shall register the Units in the Official Railway Equipment Register and "UMLER" and shall insert reporting marks provided by Lessor in the ownership field. Lessee shall compile and maintain records pertaining to the maintenance and billing for the Units in accordance with the Field Manual of the AAR Interchange Rules and the Office Manual of the AAR Interchange Rules. Lessee will grant Lessor access to all maintenance and billing records

in the AAR data exchange format and provide hard copies of all billing repair cards as reasonably requested by Lessor.

10. Warranties; Compliance with Laws and Rules; Maintenance; Insurance; Indemnification; Reports and Financial Information.

- A. Warranties. Lessor warrants that Lessor has the right to lease the Units. Lessor hereby assigns to Lessee for the Term of this Lease the benefit to which Lessor is entitled of all warranties and indemnities of the manufacturer, reconditioner, repairer or maintainer of the Units. Otherwise, except for the aforesaid, Lessor leases the Units AS-IS, AND LESSOR MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND RESPECTING THE UNITS WHETHER STATUTORY, WRITTEN, ORAL OR IMPLIED AND LESSOR HAS NOT MADE AND DOES NOT HEREBY MAKE, NOR SHALL IT BE DEEMED BY VIRTUE OF HAVING LEASED THE UNITS PURSUANT TO THIS LEASE TO HAVE MADE, ANY REPRESENTATION OR WARRANTY AS TO THE MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, DESIGN OR CONDITION OF, OR AS TO THE QUALITY OF WORKMANSHIP IN THE UNITS, ALL OF WHICH ARE EXPRESSLY DISCLAIMED, AND LESSOR SHALL NOT BE LIABLE, IN CONTRACT, TORT OR OTHERWISE, ON ACCOUNT OF ANY MANUFACTURER'S DEFECT, WHETHER HIDDEN, LATENT OR OTHERWISE DISCOVERABLE OR NONDISCOVERABLE RESPECTING ANY UNITS.
- B. Compliance with Laws and Rules. Lessee agrees, for the benefit of Lessor, to comply in all respects with all laws of the jurisdictions in which operations involving any Unit subject to this Lease may extend, with the interchange rules of the AAR and with all rules of the ICC and any other legislative, executive, administrative or judicial body exercising any power or jurisdiction over any such Unit, to the extent such laws and rules affect the operations or use of such Unit; and in the event such laws or rules require the alteration or repair of any such Unit, Lessee will conform therewith, and will maintain the same in proper condition or operation under such laws and rules; provided, however, that Lessee may, in good faith contest the validity or application of any such law or rule in any reasonable manner which does not, in the reasonable opinion of Lessor, adversely affect the property rights of Lessor hereunder.
- C. Maintenance. Lessee shall at all times during the Term of this Lease, at its own cost and expense, in accordance with the AAR Interchange Rules and FRA Railroad Freight Car Safety Standards, cause each Unit to be maintained, serviced and repaired so as to keep it in as good operating condition, working order, and repair as it was when it first became subject to this Lease, ordinary wear and tear excepted.
- (i) Subject to Section 8, if any Unit is returned to Lessor, Lessee agrees it will return such Unit to Lessor (a) in good order and repair, including the

mechanical refrigeration unit, ordinary wear and tear excepted, (b) suitable for movement in the interchange system in conformity with all applicable laws and regulations including the AAR Code of Rules and FRA Railroad Freight Car Safety Standards and (c) clear of all liens and (d) free of accumulations of commodities transported in such Unit while in the service of Lessee.

(ii) Neither party to this Lease will alter materially the physical structure or allow any third party to alter materially the physical structure of any Unit without the other party's written consent.

(iii) Any and all additions to any Unit and any replacements thereto and of parts thereof made by Lessee shall constitute accessions to such Unit and, without cost or expense to Lessor, there shall be immediately vested in Lessor the same interest therein as the interests of Lessor in such Unit.

D. Insurance. Lessee shall, at all times while this Lease is in effect, at its own expense, cause to be carried and maintained: (i) all-risk, physical loss or damage insurance with respect to each Unit in minimum amount equal to the Settlement Value (as defined in Section 8.B.); and (ii) public liability insurance in a minimum amount of twelve million dollars (\$12,000,000.00) per occurrence with respect to third party personal injury and property damage, in each case for such risks and with such insurance companies as are satisfactory to Lessor. All insurance shall be taken out in the name of Lessee and shall name Lessor and any assignee of Lessor as additional insureds and shall also list Lessor and any assignee of Lessor as loss-payees as their interests may appear on the insurance policies. Said policies shall provide that Lessor and any assignee of Lessor shall receive thirty (30) days prior written notice of any material changes in coverage or cancellation thereof. If Lessee fails to place insurance, or that said insurance expires, Lessor has the right to purchase the insurance described above and Lessee shall pay the cost thereof. With respect to the additional insureds, Lessee's insurance policies shall be primary to any other valid and available insurance ("Other Insurance") effected by, or for, the additional insureds. Lessee shall require its insurer specifically to waive subrogation, claim and recovery with respect to any Other Insurance. Any and all deductibles in the described policies shall be paid by Lessee.

Each policy obtained by Lessee shall be in accordance with the terms and conditions of this Section 10.D., and such terms and conditions shall be set forth on the Certificate of Insurance provided to Lessor. Lessee shall furnish to Lessor concurrently with execution hereof, and within

thirty (30) days of receipt of a written request from Lessor, and at intervals of not more than twelve (12) calendar months from execution hereof, Certificates of Insurance evidencing the aforesaid insurance. Lessee shall provide Lessor a Certified Copy of each insurance policy upon written request.

- E. Indemnification. Lessee agrees to indemnify, save harmless and defend Lessor against any charges or claims made against Lessor, and against any expense, loss or liability (including but not limited to counsel fees and expenses, penalties and interest) which Lessor may incur in any manner (unless resulting from Lessor's sole negligence) by reason of entering into or the performance of this Lease or the ownership of, or which may arise in any manner out of or as a result of the ordering, acquisition, use, operation, condition, purchase, delivery, rejection, storage or return of, any Unit until the date on which Lessor receives the Purchase Price for all the Units as hereinafter provided in Section 12 or, if any Unit is returned to Lessor pursuant to Section 14 hereof, the date on which such Unit is returned to Lessor, and to indemnify and save harmless Lessor against any charge, claim, expense, loss or liability on the account of any accident (unless resulting from Lessor's sole negligence) in connection with the operation, use, condition, possession or storage of such Unit resulting in damage to property or injury or death to any person. The indemnities contained in this Section 10.E. shall survive payment or performance of all other obligations under this Lease or the termination of this Lease.
- F. Reports. Lessee agrees to prepare and deliver to Lessor within a reasonable time prior to the required date of filing (or, to the extent permissible, file on behalf of Lessor) any and all mandatory reports of which Lessee has or reasonably should have actual knowledge, except income tax reports, to be filed by Lessor, with any federal, state or other regulatory authority by reason of the ownership by Lessor of the Units or the leasing of the Units to Lessee. Lessor shall notify Lessee of any such reports of which Lessor has actual knowledge.
- G. Financial Information. Lessee agrees to furnish to Lessor (i) within one hundred twenty (120) days after the close of each of its fiscal years commencing 1995, its certified consolidated balance sheet as of the end of the fiscal year and the related certified consolidated statements of income, retained earnings and changes in financial position for the fiscal year then ended, each prepared in accordance with U.S. generally accepted accounting principles; (ii) within sixty (60) days after the end of each six (6) month period of each fiscal year, its balance sheets as of such period, all of which shall be certified by the president or chief financial officer to be, in his opinion, complete and

correct and to present fairly, in accordance with generally accepted accounting principles consistently applied throughout the period involved, its financial position as of the end of such period and the results of operations for the elapsed portion of the fiscal year ended with the last day of such period, in each case on the basis presented and subject only to normal year-end auditing adjustments; and (iii) promptly from time to time, on request, such other information concerning the business, condition and affairs of Lessee as Lessor shall reasonably request.

11. **Liens.** Lessee will not directly or indirectly create, incur, assume or suffer to exist any lien on or with respect to the Units, any Unit or any part thereof, Lessor's title thereto, or any interest therein, except (a) any lien resulting from an independent act of or claim against Lessor, (b) liens for taxes either not yet delinquent or being contested by Lessee in good faith by appropriate proceedings and where, in Lessor's (and in any assignee of Lessor's) opinion, there is no danger of the sale, forfeiture or loss of the Units or any part or item thereof, and (c) materialmen's, mechanics', workmen's, repairmen's, employees', storage or other like liens arising in the ordinary course of business, which are not delinquent or are being contested by Lessee in good faith by appropriate proceedings and where, in Lessor's (and in any assignee of Lessor's) opinion, there is no danger of the sale, forfeiture or loss of the Units, or any part thereof. Lessee, at its own expense, will promptly pay, satisfy and otherwise take such actions as may be necessary to keep the Units free and clear of, and to duly discharge or eliminate or bond in a manner satisfactory to Lessor (and any assignee of Lessor), any such lien not excepted above if the same shall arise at any time. Lessee will notify Lessor (and any assignee of Lessor) in writing promptly upon becoming aware of any tax or other lien (other than any lien excepted above) that shall attach to the Units or any Unit, and of the full particulars thereof.

12. **Purchase of the Units Upon Expiration of Term.**

- A. Upon the expiration of the Term of this Lease for the Units, if no Event of Default shall have occurred and be continuing, Lessee shall purchase from Lessor all, but not less than all, the Units then subject to this Lease for the purchase price of one dollar (\$1.00) per Unit ("**Purchase Price**") plus any applicable sales, excise or other taxes imposed as a result of such sale (other than gross or net income taxes attributable to such sale). Lessor's sale of the Units to Lessee shall be "AS IS, WHERE IS," without any representation by, or recourse or warranty by Lessor. The Units shall be terminated from the Lease on the date Lessee pays to Lessor the Purchase Price for the Units ("**Date of Purchase**"). Upon Lessor's receipt of the Purchase Price for the Units, Lessor shall deliver or shall cause to be

delivered to Lessee a bill of sale for the Units duly executed by Lessor in substantially the form attached as Annex C.

- B. Effective on the date Lessor receives the Purchase Price for the Units, the Term of this Lease shall terminate with respect to the Units; provided, however, that any of Lessee's obligations under this Lease with respect to the Units incurred prior to such termination shall survive the termination of this Lease for the Units.

13. Default.

- A. If, during the continuance of this Lease, one or more of the following events (hereinafter sometimes called ("**Events of Default**") shall occur;
- (i) default shall be made in the payment of any part of the Rent provided in Section 5 hereof and such default shall continue for ten (10) days after the due date thereof;
 - (ii) Lessee shall make or permit any unauthorized assignment or transfer of this Lease or of possession of the Units, or any part thereof;
 - (iii) default shall be made in the observance or performance of any other of the covenants, conditions and agreements on the part of Lessee contained herein and such default shall continue for thirty (30) days after written notice from Lessor to Lessee specifying the default and demanding the same to be remedied;
 - (iv) any proceedings shall be commenced by or against Lessee for any relief under any bankruptcy or insolvency laws, or laws relating to the relief of debtors, readjustments of indebtedness, reorganizations, arrangements, compositions or extension (other than a law which does not permit any readjustment of the obligations of Lessee hereunder), and all the obligations of Lessee under this Lease shall not have been duly assumed in writing, pursuant to a court order or decree, by a trustee or trustees appointed for Lessee or for the property of Lessee in connection with any such proceedings in such manner that the status of such shall be the same as expense of trustees, within thirty (30) days after such appointment, if any, or sixty (60) days after such proceedings shall have been commenced, whichever shall be earlier;
 - (v) any material representation made by Lessee herein or in any certificate or other instrument

delivered under or pursuant to any provision hereof shall prove to have been false or incorrect in any material respect on the date as of which made;

then, in any such case, Lessor, at its option may:

- (vi) proceed by appropriate court action or actions either at law or in equity, to enforce performance by Lessee of the applicable covenants of this Lease or to recover damages for the breach thereof; or
- (vii) by notice in writing to Lessee terminate this Lease, whereupon all rights of Lessee to the use of the Units shall absolutely cease and terminate as though this Lease had never been made, but Lessee shall remain liable as herein provided; and thereupon, Lessor may in a reasonable manner and without damage to the property of Lessee or injury to any person by Lessor or its agents enter upon the premises of Lessee or other premises where any of the Units may be and take possession of all or any of such Units and thenceforth hold, possess and enjoy the same free from any right of Lessee, or its successors or assigns, to use the Units for any purposes whatever; but Lessor shall, nevertheless, have a right to recover from Lessee any and all amounts which under the terms of this Lease may be then due or which may have accrued to the date of such termination (computing the Rent for any number of days less than a full rental period by multiplying the Rent for such full rental period by a fraction of which the numerator is such number of days and the denominator is the total number of days in such full rental period) and also to recover forthwith from Lessee (a) as representing actual loss incurred by Lessor, damages for loss of the bargain and not as a penalty, a sum, with respect to each Unit which represents the then present value of all Rent for such Unit which would otherwise have accrued hereunder from the date of such termination to the end of the Term of this Lease as to such Unit, such present value to be computed in each case on a basis of a six percent (6%) per annum discount, compounded annually from the respective dates upon which rentals would have been payable hereunder had this Lease not been terminated, and (b) any damages and expenses, including reasonable attorneys' fees, in addition thereto, which Lessor shall have sustained by reason of the breach of any covenant or covenants of this Lease other than for the payment of Rent,

including, without limitation, expenses of sale or re-leasing (including incidental transportation costs incurred by Lessor).

- B. The remedies in this Lease provided in favor of Lessor shall not be deemed exclusive, but shall be cumulative, and shall be in addition to all other remedies in its favor existing at law or in equity. Lessee hereby waives any mandatory requirements of law, now or hereafter in effect, which might limit or modify the remedies herein provided, to the extent that such waiver is permitted by law. Lessee hereby waives any and all existing or future claims to any offset against the Rent due hereunder, and agrees to pay Rent regardless of any offset or claim which may be asserted by Lessee or on its behalf except Lessee shall be credited with any present value payments made pursuant to Subsection 13.A.(vii)(a).
- C. The failure of Lessor to exercise the rights granted it hereunder upon any occurrence of any of the contingencies set forth herein shall not constitute a waiver of any such right upon the continuation or recurrence of any such contingencies or similar contingencies.

14. Return of Units Upon Default.

- A. If this Lease shall terminate pursuant to Section 13 hereof, Lessee shall forthwith deliver possession of the Units to Lessor. The condition of the Units upon such return shall be as required pursuant to Section 12 hereof. For the purpose of delivering possession of any Unit or Units to Lessor as above required, Lessee shall at its own cost, expense, and risk:
 - (i) forthwith place such Units upon such storage tracks of Lessee as Lessor reasonably may designate or, in the absence of such designation, as Lessee may select,
 - (ii) permit Lessor to store such Units on such tracks for a period not exceeding six (6) months at the risk and expense of Lessee, and
 - (iii) transport the same, at any time within such six (6) month period, to any place on the lines of railroad operated by Lessee or to any connecting carrier for shipment, all as reasonably directed by Lessor. The assembling, delivery, storage and transporting of the Units as provided in this Section 14 are of the essence of this Lease, and upon application to any court of equity having jurisdiction in the premises Lessor shall be entitled to a decree against Lessee requiring specific performance of the covenants of Lessee

so to assemble, deliver, store and transport the Units.

- B. Without in any way limiting the obligation of Lessee under the foregoing provisions of this Section 14, Lessee hereby irrevocably appoints Lessor as the agent and attorney of Lessee, with full power and authority, at any time while Lessee is obligated to deliver possession of any Unit to Lessor, to demand and take possession of such Unit in the name and on behalf of Lessee from whosoever shall be at the time in possession of such Unit. In connection therewith Lessee will supply Lessor with such documents as Lessor may reasonably request.

15. Assignment; Possession and Use.

- A. Conditioned upon Lessee performing all of the terms, covenants, and conditions of this Lease, Lessor, its successors and assigns will not disturb Lessee's peaceable and quiet possession and use of the Units during the Term of this Lease.
- B. This Lease shall be assignable in whole or in part by Lessor without the consent of Lessee, but Lessee shall be under no obligation to any assignee of Lessor except upon written notice of such assignment from Lessor. All the rights of Lessor hereunder (including but not limited to the rights under Sections 7, 10 and 13) shall inure to the benefit of Lessor's assigns. Whenever the term Lessor is used in this Lease it shall apply and refer to each assignee of Lessor. In conjunction with any assignment of this Lease by Lessor, Lessee hereby agrees to provide any reasonable documentation requested by Lessor.
- C. So long as Lessee shall not be in default under this Lease, Lessee may with prior written consent of Lessor sublease any one or more of the Units or assign this Lease to third parties; provided, that (i) such sublease or assignment shall provide that the subject Units shall be operated and maintained in accordance with the terms hereof; (ii) Lessee shall provide Lessor with ten (10) days advance notice of any such sublease or assignment and a copy of such sublease or assignment; (iii) such sublease shall be subject and subordinate to the terms and provisions of this Lease and the interests of Lessor; and (iv) no such sublease or assignment shall relieve Lessee of its obligations hereunder, which shall remain those of a principal and not a surety.
- D. Lessee represents and warrants that: (i) Lessee (or any assignee or sublessee) will not at any time during the Term of this Lease use or fail to use any Unit, in such a way as to disqualify it as "Section 38 property" within the meaning of Section 48 of the United States Internal Revenue Code; (ii) Lessee (or any assignee or sublessee) will at

all times during the Term of this Lease use each Unit in such a way that for federal income tax purposes, all amounts includable in the gross income of Lessor with respect to each Unit and all deductions allowable to Lessor with respect to each Unit will be treated as derived from, or allocable to, sources within the United States; and (iii) Lessee will maintain sufficient records to verify such use, which records will be furnished to Lessor within thirty (30) days after receipt of a written demand therefor.

- E. As security for its obligations hereunder, Lessee hereby assigns to Lessor, and grants a security interest in favor of Lessor in and to, all of Lessee's right, title, and interest in and to any and all (i) rents and proceeds from the use of the Units by others, including car hire charges and interline payments made and owed by other railroad companies and rents under subleases permitted by Section 15 hereof, and (ii) proceeds of and recoveries from insurance, interline settlements for destruction, payments and compensation from taking or requisitioning authorities, or similar payments from other parties in respect of loss of or damage to any Unit. If and so long as no Event of Default or event that with the passage of time or giving of notice would become an Event of Default shall have occurred hereunder, Lessee shall be entitled to collect, receive, and apply such amounts, but upon the occurrence of such an Event of Default or event, Lessor shall be entitled to collect and receive such amounts and apply the same to the obligations of Lessee hereunder, and to exercise all rights and remedies of a secured party with respect to such amounts.
- F. Lessee shall execute and file and record this instrument or any evidence hereof or financing statement with respect thereto in such manner and in such public offices as shall be requested and provided by Lessor and shall be necessary or appropriate to perfect and protect the interest of Lessor under this section.
- G. So long as Lessee shall not be in default under this Lease, Lessee shall be entitled to the possession and use of the Units in accordance with the terms of this Lease, but Lessee shall not assign or transfer (except as otherwise permitted by this Section 15) or encumber its leasehold interest under this Lease in the Units. Lessee shall not, without the prior written consent of Lessor, part with the possession or control of, or suffer or allow to pass out of its possession or control, any of the Units, except to the extent permitted by the provision of Section 15.H. below.
- H. Nothing in this Section 15 shall be deemed to restrict the right of Lessee to assign or transfer its leasehold interest under this Lease in the Units or possession of the Units to any corporation (which shall have duly assumed the

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obligations hereunder of Lessee) into or with which Lessee shall have become merged or consolidated or which shall have acquired the property of Lessee as an entirety or substantially as an entirety; provided, however, (i) that such assignee or transferee will not, upon the effectiveness of such merger, consolidation or acquisition be in default under any provision of this Lease, (ii) such assignee or transferee shall be of a character so that after giving effect to such merger, consolidation or acquisition, the ability of the assignee or transferee to perform the obligations of Lessee hereunder shall not, in the reasonable opinion of Lessor, be adversely affected; and (iii) such assignee or transferee shall execute an assumption agreement expressly assuming all of the obligations of Lessee hereunder (including, but not limited to, Section 17 hereof).

- I. Lessee agrees that during the Term of this Lease, Lessee will not assign any Unit to service involving the operation and maintenance thereof outside the United States of America and that operation of any Unit outside the United States of America will be limited to incidental and temporary use in Canada.

16. Opinions of Counsel. Concurrently with or as soon as practicable after the execution and delivery of this Lease and at such other times as Lessor shall reasonably request, the Lessee will deliver to the Lessor the written opinion of counsel for the Lessee, substantially in the form of Annex D attached hereto, and in scope and substance reasonably satisfactory to the Lessor and its counsel or Lessor's assignee, as the case may be, to the effect that:

Lessor: _____

Lessee: EMA

- A. Lessee is a corporation legally incorporated and validly existing, in good standing, under the laws of its jurisdiction of incorporation, with adequate corporate power to enter into this Lease;
- B. this Lease has been duly authorized, executed and delivered by Lessee and constitutes a valid, legal and binding agreement, enforceable in accordance with its terms;
- C. the execution and performance of this Lease will not contravene or breach or create a material default under any legal, organizational or contractual obligation binding upon Lessee;
- D. if this Lease has been duly filed and recorded with the ICC under 49 U.S.C. 11303, then no other filing or recording is necessary to protect in the United States of America the right, title and interest of Lessor in and to the Units.

17. Recording. Upon the full execution of this Lease by both parties, Lessor will cause a Memorandum of this Lease in the form attached hereto as Annex E to be filed and recorded with

the ICC in accordance with 49 U.S.C. 11303. Lessee will, from time to time, do and perform any other act and will execute, acknowledge, deliver, file, register, record and deposit (and will refile, re-register, re-record or redeposit whenever required) any and all further instruments required by law or reasonably requested by Lessor, including any documents in connection with any sublease or assignment permitted by Section 15 hereof and any such sublease or assignment, for the purpose of proper protection to the satisfaction of Lessor of its title to the Units or for the purpose of carrying out the intention of this Lease.

18. **Notices.** Any notice required or permitted to be given by either party hereto to the other shall be deemed to have been given when transmitted and received via telecopy, sent by overnight air courier or deposited in the United States mails certified, first-class postage prepaid, addressed as follows:

If to Lessor: National City Leasing Corporation
101 South Fifth Street
Louisville, KY 40202
FAX: (502) 581-6488
ATTN: Mr. Ronald L. Johnson
Vice President

If to Lessee: Railtex, Inc.
4040 Broadway, Suite 200
San Antonio, TX 78209
FAX: (210) 841-7629
ATTN: Mr. Gerald M. Cochran
Chief Mechanical Officer

or if sent by telecopy to the FAX numbers set forth above, or addressed to either party at such other address or telecopy number as such party shall hereafter furnish to the other party in writing.

19. **Severability.** Any provision of this Lease which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.
20. **Effect and Modification of Lease.** This Lease exclusively and completely states the rights of Lessor and Lessee with respect to the leasing of the Units and supersedes all other agreements, oral or written, with respect thereto. No variation or modification of this Lease and no waiver of any of its provisions or conditions shall be valid unless in writing and signed by duly authorized signatories for Lessor and Lessee.

21. **Successors and Assigns.** This Lease will bind and inure to the benefit of the respective successors and permitted assigns of the parties hereto.
22. **Execution.** This Lease, and any lease supplemental hereto, may be executed in several counterparts, each of which so executed shall be deemed to be an original, and in each case such counterparts together shall constitute but one and the same instrument.
23. **Law Governing.** This Lease shall be construed, and all questions concerning its performance and the rights and remedies of the parties hereunder shall be determined, in accordance with the laws of Kentucky; provided, however, that the parties shall be entitled to all rights conferred by 49 U.S.C. 11303.
24. **Headings.** The headings appearing at the commencement of certain sections or subsections herein are for convenience only, and the content or body of the section(s) or subsection(s) thereunder shall control. The numbering system is also included for convenience only.

IN WITNESS WHEREOF, each party, pursuant to due corporate authority, has caused this Lease of Railroad Equipment dated as of February 22, 1995 to be executed by its authorized representative, and each of the undersigned hereto declare that the foregoing is true and correct and was executed on the date indicated below its signature.

LESSOR

LESSEE

NATIONAL CITY LEASING
CORPORATION

RAILTEX, INC.

By: [Signature]

By: [Signature]

Title: V.P.

Title: President

Date: 2/27/95

Date: February 21, 1995

STATE OF KENTUCKY)
)
COUNTY OF JEFFERSON) S
)

On this 27th day of FEBRUARY, 1995, before me personally appeared TONI SCOTT, to me personally known, who, being by me duly sworn says that she is VICE PRESIDENT of NATIONAL CITY LEASING CORPORATION, that said instrument was signed and sealed on behalf of said corporation by authority of its President and Directors and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

Brenda Smith
Notary Public

My Commission Expires: Notary Public, State at Large, KY.
My commission expires Feb. 27, 1996

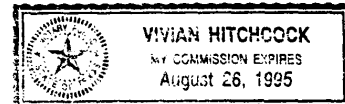
[Notarial Seal]

STATE OF TEXAS)
)
COUNTY OF BEXAR) S
)

On this 21st day of February, 1995, before me personally appeared Ernie M. Gabe, to me personally known, who, being by me duly sworn says that he is President of RAILTEX, INC., that said instrument was signed and sealed on behalf of said corporation by authority of its President and Directors and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

Vivian Hitchcock
Notary Public

My Commission Expires: 8-26-95



[Notarial Seal]

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ANNEX A

To the Lease of Railroad Equipment dated February 22, 1995 between National City Leasing Corporation and Railtex, Inc.

Equipment Description:

Ten (10), 70-ton, mechanical refrigerator boxcars manufactured by Pacific Car and Foundry Company in 1970

**Old Reporting Mark
and Numbers**

FGMR 13001
FGMR 13012
FGMR 13016
FGMR 13068
FGMR 13072
FGMR 13077
FGMR 13100
FGMR 13154
FGMR 13279
FGMR 13283

**New Reporting Mark
and Numbers**

MNA 13001
MNA 13012
MNA 13016
MNA 13068
MNA 13072
MNA 13077
MNA 13100
MNA 13154
MNA 13279
MNA 13283

W

ANNEX B

To the Lease of Railroad Equipment dated February 22, 1995 between National City Leasing Corporation and Railtex, Inc.

CERTIFICATE OF ACCEPTANCE

The undersigned, a duly authorized representative of Railtex, Inc. ("Lessee"), does hereby certify that he has caused to be inspected and, on the date set out below, has accepted on behalf of Lessee the following described Units of equipment, which Units are in good order, condition and repair and conform in all respects to the terms, provisions, requirements and standards of the certain Lease of Railroad Equipment dated as of February 22, 1995 between National City Leasing Corporation and Lessee.

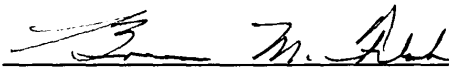
Equipment Description:

Ten (10), 70-ton, mechanical refrigerator boxcars, built by Pacific Car and Foundry in 1970.

Reporting Mark: MNA

<u>Unit Number</u>	<u>Acceptance Date</u>
13001	12/08/94
13012	12/08/94
13016	12/08/94
13068	12/08/94
13072	12/08/94
13077	12/08/94
13100	12/08/94
13154	12/08/94
13279	12/08/94
13283	12/08/94

AUTHORIZED REPRESENTATIVE:

By: 
Title: President
Date: February 21, 1995

ANNEX C

**To the Lease of Railroad Equipment dated February 22, 1995 between
National City Leasing Corporation and Railtex, Inc.**

BILL OF SALE

NATIONAL CITY LEASING CORPORATION, (the "Seller"), for the sum of ten dollars (\$10.00), and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, hereby sells, transfers and assigns to RAILTEX, INC., (the "Buyer") all its rights, title and interest in and to the ten (10) boxcars, as more particularly described on Attachment A hereto (collectively the "Units"), "AS IS", "WHERE IS" and without any warranty by Seller, express or implied, as to the condition, merchantability, fitness for a particular purpose or any other matter whatsoever relating to the Units.

Seller hereby warrants to Buyer that it has good title to the Units, free and clear of all claims, liens and encumbrances arising by or through Seller and that it has the right to sell same.

NATIONAL CITY LEASING CORPORATION

By: _____

Title: _____

Date: _____

W

ANNEX C - Continued

EXHIBIT A

Equipment Description:

Ten (10), 70-ton, mechanical refrigerator boxcars, built by Pacific Car and Foundry in 1970.

Reporting Mark: MNA

Unit Numbers:

13001
13012
13016
13068
13072
13077
13100
13154
13279
13283

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ANNEX D

To the Lease of Railroad Equipment dated February 22, 1995 between National City Leasing Corporation and Railtex, Inc.

[LESSEE LETTERHEAD]

RAILTEX, INC.

OPINION OF COUNSEL

To whom it concerns:

As Counsel for Railtex, Inc (the "Lessee"), I have examined and am familiar with that certain Lease of Railroad Equipment dated as of February 22, 1995 (the "Lease") between National City Leasing Corporation (the "Lessor") and Lessee.

I have also examined and am familiar with the corporate and other proceedings taken by the Lessee in connection with the Lease, as well as such other records and data as I have deemed relevant and necessary as the basis for my opinion set forth herein.

I am of the opinion that:

(a) Lessee is a corporation legally incorporated and validly existing, in good standing, under the laws of its jurisdiction of incorporation, with adequate corporate power to enter into this Lease;

(b) this Lease has been duly authorized, executed and delivered by Lessee and constitutes a valid, legal and binding agreement, enforceable in accordance with its terms;

(c) the execution and performance of this Lease will not contravene or breach or create a material default under any legal, organizational or contractual obligation binding upon Lessee;

(d) if this Lease has been duly filed and recorded with the ICC under 49 U.S.C. 11303, then no other filing or recording is necessary to protect in the United States of America the right, title and interest of Lessor in and to the Units.

Very truly yours,

W

ANNEX E

To the Lease of Railroad Equipment dated February 22, 1995 between National City Leasing Corporation and Railtex, Inc.

MEMORANDUM OF
LEASE OF RAILROAD EQUIPMENT

THIS MEMORANDUM OF LEASE OF RAILROAD EQUIPMENT ("Memorandum of Lease") made as of February 22, 1995 is intended to evidence the Lease of Railroad Equipment, dated as of February 22, 1995 (the "Lease") between NATIONAL CITY LEASING CORPORATION, a Kentucky corporation (hereinafter called "Lessor"), and RAILTEX, INC., a Texas corporation ("Lessee"), for the purpose of satisfying the requirements of recordation with the Interstate Commerce Commission under Section 49 of U.S.C. 11303. Lessor has the right to lease the ten (10) boxcars, more fully described in Exhibit A hereto (the "Units"). Lessee leased from Lessor the Units at the rentals and upon the terms and conditions provided in the Lease.

IN WITNESS WHEREOF, each party, pursuant to due corporate authority, has executed this Memorandum of Lease on the date indicated below its signature.

LESSOR

LESSEE

NATIONAL CITY LEASING
CORPORATION

RAILTEX, INC.

By: [Signature]

By: [Signature]

Title: President VICE PRESIDENT Title: President

Date: FEBRUARY 23, 1995 Date: February 21, 1995

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ANNEX E - Continued

EXHIBIT A

To the Memorandum of Lease of Railroad Equipment dated February 22, 1995 between National City Leasing Corporation and Railtex, Inc.

Equipment Description:

Ten (10), 70-ton, mechanical refrigerator boxcars manufactured by Pacific Car and Foundry Company in 1970.

**Old Reporting Mark
and Numbers**

FGMR 13001
FGMR 13012
FGMR 13016
FGMR 13068
FGMR 13072
FGMR 13077
FGMR 13100
FGMR 13154
FGMR 13279
FGMR 13283

**New Reporting Mark
and Numbers**

MNA 13001
MNA 13012
MNA 13016
MNA 13068
MNA 13072
MNA 13077
MNA 13100
MNA 13154
MNA 13279
MNA 13283

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ANNEX E - Continued

STATE OF KENTUCKY)
) S
COUNTY OF JEFFERSON)

On this ____ day of _____, 1995, before me personally appeared _____, to me personally known, who, being by me duly sworn says that he is _____ of NATIONAL CITY LEASING CORPORATION, that said instrument was signed and sealed on behalf of said corporation by authority of its President and Directors and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

Notary Public

My Commission Expires: _____

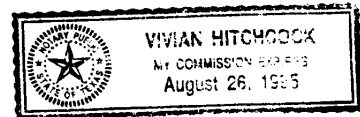
[Notarial Seal]

STATE OF TEXAS)
) S
COUNTY OF BEXAR)

On this 21st day of February, 1995, before me personally appeared Bruce M. Hahn, to me personally known, who, being by me duly sworn says that he is President of RAILTEX, INC., that said instrument was signed and sealed on behalf of said corporation by authority of its President and Directors and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

Vivian Hitchcock
Notary Public

My Commission Expires: 8-26-95



[Notarial Seal]

W